

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1141 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AGARIA OSMAN ALARKHA

Versus

SANGAR AMIN HUSEN

Appearance:

MS NITA C BANKER for Petitioner
MR YS MANKAD for Respondent No. 1
MR SURESH M SHAH for Respondent No. 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/11/98

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated 6th July 1989, passed by the then learned Civil Judge (S.D.), Kuchchh at Bhuj, in Special Civil Suit No. 131 of 1985 on his file, dismissing the suit, the original plaintiff has filed this appeal.

2. The facts which led the appellant to prefer this appeal may in brief be stated. The appellant belongs to Bhuj. He deals in scrap. The respondent No.1 is the minor son of his daughter while respondent No.2 is his

son-in-law and father of respondent No.1. The respondent No.3 is the brother of respondent No. 2. All the three respondents reside at Mandvi in Kutch District. Ramsinh Bhavarsinh Shekhavat had when auction was held purchased the boat from Border Security Force, the number of which is NLV Dwarka Model 1960. It was moored at the sea-shore at Mandvi. The appellant was planning to purchase the boat. He purchased the boat from Ramsinh Bhavarsinh Shekhavat for Rs. 25,500/-. The writing thereof was got executed in favour of respondent No.1. The said original document is in possession of the respondent No.2 the guardian of respondent No.1. The transaction was thus the benami transaction. The respondent No.2 had to look after the boat. The boat was purchased for his personal use and out of his money he earned by self-exertion. To show that he purchased the same from Ramsinh Bhavarsinh Shekhavat an affidavit in his favour is made by Ramsinh. The respondents joined hands so as to grab the boat taking the advantage of benami transaction. The respondent No.2 executing the document illegally has sold the boat to the respondent No.3 on 7-11-94. The said sale being illegal is not binding to him. Though he has protested, the respondents are trying to get the name of respondent No.3 mutated in relevant registers. As his right, title and interest in the boat were being denied and jeopardised by such illegal sale transaction, a notice was given to the respondents. They paid no heed to the notice. The appellant was therefore constrained to file the suit being Special Civil Suit No. 131 of 1985 in the Court of the Civil Judge (S.D.) at Bhuj for a declaration that the respondents were having no right, title or interest in the boat, the sale effected by respondents No. 1 & 2 in favour of respondent No.3 was null and void, and he was not bound to make the payment of the loan if at all taken by respondents pledging the boat, and for a permanent injunction restraining the respondents from raising any loan, pledging the boat or creating any encumbrance thereon and also for the possession of the boat as well as accessories thereof from the respondents etc. The respondents appeared before the trial court and filing Written Statement at Ex. 30, they resisted the claim of the appellant. Necessary issues were then framed. Appreciating the evidence on record, the learned Civil Judge (SD), Bhuj held that the appellant failed to establish the case he had alleged. He therefore dismissed the suit with no order as to costs. It is against that judgment and decree, the present appeal is filed.

3. Assailing the judgment and decree of the lower

Court, the learned advocate representing the appellant submits that the learned Civil Judge ought to have relied upon the certificate Ex. 72 issued by Ramsinh Shekhavat, which was the first-rate proof regarding ownership of the boat. The fact that the respondents No. 1 & 2 did not prefer to step in the witness box and give evidence has been overlooked. There was on record no reason to discard the evidence of the appellant and his witnesses. The pleadings are to be viewed broadly. If inadvertently a mistake is made while advancing the case in plaint, the same has to be ignored; it is not to be twisted in a way amounting to making a mountain out of a molehill. By mistake it was pleaded in plaint that the transaction was the benami transaction though in fact it was not so. The evidence therefore ought to have been appreciated in that perspective, rather than finding fault with the pleadings. The appellant being old man wanted to settle his grandson well and so he purchased the boat in the name of the grandson and handed over the custody thereof to respondent No.2 the guardian of his grandson (respondent No.1), but the respondent took disadvantage of helplessness of the appellant.

4. About the nature of the transaction, the case pleaded in the plaint has to be seen. But when the contention about the mistake is raised, the evidence led will be the clear pointer. It may be mentioned that perusal of whole of the evidence and above contentions make it clear that no mistake in the pleadings has been made. The evidence is led to show that transaction was the benami transaction. When the plaint is perused, it appears clearly that the boat was purchased in the name of the respondent No.2 in his capacity as guardian of respondent No.1 who is minor. When such case is clearly and without any ambiguity, pleaded and thereon necessary issues are also sought & framed, and the appellant also led the evidence on the issues framed, so as to establish the case pleaded, it is not open to the appellant to take a stand in clear departure of the case he initially pleaded. It seems to have the desired order appellant after cogitation decided to dodge and speculatively contended about the mistake in pleadings. In this case, when the case is clearly put up about the benami transaction, the evidence has to be appreciated keeping that case in mind and the law applicable.

5. It may be stated at this stage on whom the burden to prove the benami transaction is cast and what are the determinant facts or circumstances to prove the same. The Calcutta High Court in the case of Amit Mukherjee Vs. Smt. Bibhabati Dasi & Others AIR 1979 Calcutta 344 has

made it clear, that the benami transaction must be proved by the party alleging the same to be the benami transaction. The Supreme Court in the case of Jaydayal Poddar (Deceased) through L.Rs. and another Vs. Mst. Bibi Hazra and others - AIR 1974 S.C. 171 has elaborated the point and made it clear that the burden to prove a particular sale to be the benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. The burden is to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami, or establish the circumstances unerringly and reasonably raising an inference of that fact. The essence of Benami is the intention of the party or parties concerned and not unoften such intention is shrouded in a thick veil which cannot easily be pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Whether a particular transaction is benami or not is a question of fact, and for determining this question, no straight jacket formulae can be laid down or uniformly applicable formulae to all situation can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by the circumstances namely; (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale. Such indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another. When the evidence on record is perused, no where I find satisfaction of either of the indicia pointed out by the Supreme Court in this Jaydayal's case.

6. Of course, neither the respondent No.1 or respondent No.2 has stepped in the witness box and deposed, but their such omission will not establish the case the appellant has put-forth. If the party knowing the fact does not step in the witness box and submit to the cross-examination of the other side, it is a circumstance on record going to discredit the truth of his case and not the case of his other side. Omission to

depose by the antagonist will not establish the case of the party who is in law bound to prove his case. The appellant has come forward with the case about benami transaction in the plaint. When that is so, it is incumbent upon him to establish the case he is asserting.

He has led no evidence to prove the case he has alleged and whatever evidence he has led is for the reasons stated hereinbelow not reliable or worthy of credence. It is therefore not open to him to contend that as the respondents No. 1 & 2 have not stepped in the witness box his case gets corroborated. The contention advanced on behalf of the appellant therefore fails.

7. The appellant has deposed at Ex. 69. He has made it clear when questioned that he was having no accounts with any of the banks. He has also not made clear how he raised the fund of Rs. 25,500/- so as to purchase the boat. It may be remembered that he was in or around 1985 when the suit was filed, maintaining himself by dealing in scrap at Bhuj. He has led no evidence about his income and savings. By which source he raised the fund is also not made clear. He has admitted that he does not have any proof relating to the fund he was having for purchasing the boat. It may be noted that he resides with his another son-in-law who maintains him. Dayalsinh Bhavarsinh Negi (Ex.91) is examined in support of the fact that the payment of Rs. 25,000/- was made by the appellant to Ramsinh Bhavarsinh Shekhavat, but when the appellant has led no evidence about the fund he was having or about the source for raising fund, the evidence of Dayalsinh Negi being feint & losing its fecundability can be said to have been got up. The important factor, namely the source, from where the purchase money came, is, thus, not clearly established. There is also no acceptable evidence about the motive for giving the transaction a Benami colour. If at all it was purchased for the well-being of respondent No.1 who was minor, and appellant wanted to keep his ownership in tact, he could have purchased in his name so that in case of hostile situation taking shape in future he could guard his interest well. The boat could have been transferred in the name of respondent No.1 after he attained majority and found capable of managing his affairs. Further in the plaint, the appellant has made it clear that the title deed is in the possession of the respondents Nos. 1 & 2. Why the same is kept in the custody of respondents Nos. 1 & 2 and not in his custody though he paid the amount and for his use as well the boat was purchased is not acceptably explained. It transpires that the machine of the boat is in possession of the appellant. If the well-being of

respondent No.1 was at his heart, he would not have kept the machine with him which deprived the respondent No.1 from ferrying the same. There was no reason to keep the boat in non-use and cause it to be decayed by passage of time. There is also no reason to agree with the contention that to check the misuse the machine was taken to Bhuj, because in that case also the appellant was not going to be benefitted, as the possibility of using the boat by respondents either by with or without the Bank-loan purchasing new machine or hiring the machine, and getting the machine at Bhuj decayed could not be ruled out. Of course appellant has denied the fact but it appears from the evidence of respondent No.3 that the appellant later on purchased the engine of the boat from respondent No.2, and it is plausible because of the just stated reason. He deals in scrap. The machine might have by passage of time turned into scrap and he thought it wise to use it for several other purposes detaching the parts, or sell the same & earn for his livelihood. The fact that appellant purchased the machine is the circumstance on record going to discredit the truth of his case. As laid down by the Supreme Court in Jaydayal's case (Supra), therefore, the indicia namely source of purchase money, motive and custody of the title deed discussed hereinabove as well as possession of the boat being with respondents from the very beginning are the circumstances on record indicating that the transaction in question is really not the benami transaction, as alleged.

8. Reliance is also placed on the certificate Ex. 72 which is given by Ramsinh Shekhavat who as alleged sold the boat to the appellant. But the same cannot be taken to be the decisive factor. In the port-office registers, the names of respondents Nos. 1 & 2 were mutated as owners of the boat. In support of the mutation Ramsinh Shekhavat also filed affidavit, the copy of which is produced at Ex.180. In his affidavit, Ramsinh Shekhavat has stated that he sold the boat to respondent No.2. When the seller thus comes forward with cross-cutting say regarding the sale of the boat at different times, the certificate (Ex.72) in the absence of any other cogent evidence on record is required to be ignored holding that the same was subsequently got up for the purpose of this suit.

9. No doubt, the appellant has examined several witnesses in support of his say, but their evidence inspires no confidence leaving no room to doubt. About the knowledge they were having, or the works they did, or works which were to be assigned to them relating to the

boat, the witnesses have been examined, but in his evidence the appellant is silent about the witnesses, their knowledge or the works which were to be done by them. When appellant says nothing, the corroborative evidence loses its value and no reliance can be placed thereon. Dealing with the evidence of those witnesses in details, the learned Judge has rightly found that the case of the appellant was not worthy of credence, and the evidence of all those witnesses was not trustworthy. I am in general agreement with the learned Judge and so it is not necessary to restate the reasons given by the learned Judge and deal with the evidence of all the witnesses separately. Suffice it to say that with the active assistance of both the learned advocates, I have in details carefully perused the evidence and I find no good cause to take a different view than taken by the learned Judge relating to the evidence led by appellant. The evidence is tinted with penchant for the appellant. The learned Judge is right in placing no reliance on the evidence of appellant & his witnesses.

10. Assuming the situation that if the court agrees to the case of benami transaction alleged in the plaint, Mr. Shah, learned advocate representing the respondent No.3 shows Para 607 in the book on Hindu Law by Mulla, 16th Edition and submits that the respondent No.3 who is the purchaser of the boat did not have the knowledge of the real owner. He is the bonafide purchaser for value without notice, either actual or constructive, that respondent No.2 was the benamidar. Hence the appellant is not entitled to have the transfer set aside or have the possession of the boat. It may be stated that in view of the above discussed facts and law, the case about benami transaction is not established. The respondent No.2 is found to be the real owner, and when he has in that capacity sold the boat to respondent No.3, the issue for consideration does not survive. However, it may be stated that the contention assumes academic importance. For the sake of argument, if it is assumed that the respondent No.2 was the benamidar, the rights, title and interest acquired by respondent No.3 are not at all adversely affected or jeopardised. The purchaser has to in law inquire in whose name the property stands and who is in actual possession. If he fails to do so, he can be assumed to have constructive notice that seller is not the real owner. In that case the sale can be set aside. There is no evidence on record indicating that respondent No.3 was having the actual notice about the benami transaction and knowing fully well about the same he agreed to purchase. He had been to Muscat & Saudi Arabia for his livelihood. After he returned to India he

purchased the boat. The respondents Nos. 1 & 2 were in possession of the boat and the registers of the Port Office were showing that the boat was in the name of respondent No.2. He had no reason to believe that respondent No.2 was not the real owner. He is therefore the bonafide transferee without notice about the benami transaction. He therefore cannot be ordered to hand over the possession of the boat.

11. The learned Judge has, while dealing with the question about the benami transaction, observed referring Section 4 of The Benami Transaction (Prohibition) Act, 1988, that the transaction in question being barred by the provision of Section 4, the suit was not maintainable. Though I am maintaining the judgment and decree passed by the learned Civil Judge (S.D.), it must be mentioned that I do not agree with this part of the judgment and observation based on Section 4 of The Benami Transaction (Prohibition) Act. The Act came into force from 5th December 1988, while the transaction in question took place in 1984, i.e., prior to the Act came into force. There is nothing in the Act which makes the provision retrospective. In this case, therefore, I have not based any of my conclusion on any of the provisions of The Benami Transaction (Prohibition) Act, 1988.

12. My attention is drawn to different provisions of the Merchant Shipping Act, 1958. As per Section 23 of the Act, the ships are to be registered at Ports of registry. Section 25 provides that Register Book shall be maintained wherein entries regarding owners are to be posted. An application for registry of the Indian Ship is to be made. A person can be registered as the owner of an Indian Ship only if he makes a declaration of ownership which must contain the particulars mentioned in Section 29. At the time of first registry as per Sec. 30 evidence on the particulars over and above declaration of ownership mentioned therein is to be produced. Sec.31 provides that on completion of requirements preliminary to registry, the particulars relating to name of ship, name of port to which she belongs, details of surveyors's certificate, particulars of declaration of ownership and name of her registered owner or owners are to be entered in the register book, while as per Sec. 32 documents namely surveyor's certificate, builder's certificate, any instrument of sale and declarations of ownership are to be retained by the Registrar. As per Sec. 34 the Registrar has to grant the certificate of registry. Sec. 43 provides that every instrument, for the transfer of an Indian Ship, when duly executed is required to be produced to the Registrar of her port of registry and

entries thereof are to be made in the register book. On the basis of these provision, it is the contention of the respondents' learned advocate that the entries made in the register book would show who is the owner of the ship or vessel. As per the requirements of the above-referred provisions undergoing necessary formalities the respondents Nos. 1 & 2 got the entries posted, and after the boat was sold to respondent No.3, as per Sec. 43 entry was got posted. No such procedure has been followed by the appellant and no where his name appears in Register book. The case of benami transaction is therefore meritless.

13. On perusal of the provision it appears clearly that procedure undergone thereunder and entries posted in relevant register cannot be said to be the proof of title or document of title. On the basis of instrument of transfer or declaration of ownership, the entries are made. The issue of title or ownership of the ship or vessel is not investigated and adjudicated or determined. The entries on the basis of declaration of ownership are posted so that concerned person can be fastened with liability qua charges or fees to be levied, and other liabilities that arise under the Act or other laws in force. The registers maintained by the Port Office and entries made therein are therefore not the documents of title or proof thereof. The respondents therefore cannot base their claim on the entries made in Register of book and urge to disbelieve the appellant's case. Likewise omission on the part of appellant will not damage his case because the real owner in benami transaction has hard nut to crack. The ownership of the boat is to be decided on the basis of documents of title or other cogent circumstances if there is no title deed. Likewise the benami transaction is to be proved as stated hereinabove. The contention therefore does not gain a ground to stand upon. It may be stated that on the strength of other evidence discussed hereinabove and by the learned Judge below, the case of benami transaction is not established.

14. For the aforesaid reasons, the appeal being devoid of merits, is required to be dismissed and is accordingly dismissed.

15. At this stage, the learned advocate representing the appellant urges to pass the order which this Court passed in Misc. Civil Application No. 2044 of 1988 because the appellant is to approach the higher forum against the decision of this Court. The rights and interest of the appellant are required to be protected

till appropriate order is passed by the higher forum at the admission stage. Considering the questions involved for which the appellant wants to move the higher forum, the respondents are, for a period of six weeks from today, restrained from alienating or transferring the boat in any manner to any one, or using the boat in question for any illegal purpose, and also from parting with the possession in any manner which may prejudice or jeopardise the claim of the appellant. It would be open to the appellant to ferry the boat for his legitimate business or livelihood within Indian territory only and not outside thereof for a period six weeks from today.

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(rnr).